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No. _____

In The

Supreme Court of the United States

BLUE SPRINGS FORD SALES, INC.,
BLUE SPRINGS FORD WHOLESALE OUTLET,
ROBERT DUDLEY, FRED GRAHAM, DON ISOM,

Petitioners,

vs.

VICKI GRABINSKI,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under what circumstances may a federal appellate court, consistent with the *Erie* doctrine, reverse an outcome determinative finding on a state law question made by a district court sitting in diversity when that district court finding was based on uniform precedent of the state's intermediate appellate courts, and when the state supreme court has not yet definitely decided the issue?

PARTIES

The caption of this case contains the names of all parties. Petitioners Blue Springs Ford Sales, Inc. and Blue Springs Ford Wholesale Outlet have no parent or subsidiary companies.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on February 16, 2000.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit that gives rise to this petition is reported at 203 F.3d 1024, and is reprinted in Appendix A hereto ("App. A") at pages A-1 – A-9. The Memorandum and Order of the United States District Court for the Western District of Missouri that the Eighth Circuit was reviewing, entered October 27, 1998, is unpublished, and is reprinted as Appendix B (hereto "App. B"), at pages B-1 – B-22. The Eighth Circuit decided an earlier appeal in this case, which is not directly relevant to this petition. That earlier opinion is reported at 136 F.3d 165, and concerned a March 26, 1996 Memorandum and Order of the District Court, which is unpublished and is reprinted in Appendix D (hereto "App. D"), at pages D-1 – D-7.

JURISDICTION

The judgment of the Eighth Circuit sought to be reviewed was entered on February 16, 2000. Petitioners timely filed a petition for rehearing and an alternative petition for rehearing en banc on March 1, 2000, which

were denied on March 21, 2000. App. C. This Court has jurisdiction under 28 U.S.C. § 1254(1) (1993).

STATUTES INVOLVED

Two statutes are at issue in this case. One is a section of the Missouri Merchandising Practices Act, Mo. Rev. Stat. 1994 § 407.025.1 (1994 and Supp. 1999), which provides:

> **407.025. Civil action to recover damages – class actions authorized, when – procedure. –**
>
> 1. Any person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers an ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful by section 407.020, may bring a private civil action in either the circuit court of the county in which the seller or lessor resides or in which the transaction complained of took place, to recover actual damages. The court may, in its discretion, award punitive damages and may award to the prevailing party attorney's fees, based on the amount of time reasonably expended, and may provide such equitable relief as it deems necessary or proper.

The second statute is 42 U.S.C. § 1988(b) (West Supp. 2000), which provides:

§ 1988. Proceedings in vindication of civil rights.

(b) Attorney's fees. In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, the Religious Freedom Restoration Act of 1993, title VI of the Civil Rights Act of 1964, or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

STATEMENT OF THE CASE

This case concerns the method by which federal courts determine substantive state law to be applied in diversity cases under the *Erie* doctrine. It specifically raises the question of the extent to which federal courts may ignore uniform contrary precedent from a state's intermediate courts as they "predict" how the state's highest court would rule.

In this case, plaintiff Vicki Grabinski bought a used vehicle from the defendant, Blue Springs Ford Wholesale Outlet ("Outlet"). The vehicle had been received as a trade-in at defendant Blue Springs Ford Sales, Inc. ("Sales") and sold to the Outlet for $4,500. It was in turn sold to Ms. Grabinski for $5,500 in 1993. Ms. Grabinski

kept the vehicle for two years, drove it more than 25,000 miles, and received a $7,500 trade-in allowance ($4,000 actual cash value) for it when she purchased a newer vehicle.

Ms. Grabinski brought suit in the United States District Court for the Western District of Missouri against Sales, the Outlet, and three individual salesmen. She alleged that the defendants had misrepresented to her the condition of the vehicle and had concealed the fact that the vehicle had been involved in a serious accident several owners earlier. She brought her case in two alternative counts. First, she alleged common law fraud in Count I of her Complaint, and sought actual and punitive damages. Second, she asserted an alternative claim in Count V under the Missouri Merchandising Practices Act, Mo. Rev. Stat. § 407.025, for actual and punitive damages and attorney's fees. The fraud claim was tried to a jury, and the Merchandising Practices Act claim directly to the District Court. The two claims are unquestionably alternative ones under Missouri law. *See Lauria v. Wright*, 805 S.W.2d 344, 347 (Mo. Ct. App. 1991) ("A cause of action for damages for common law fraud and a claim under Section 407.025 are alternative causes of action.").

The jury awarded Ms. Grabinski $7,835 in actual damages and a total of $210,000 in punitive damages against five defendants on the fraud count, and the District Court entered judgment in those amounts on that count of the Complaint. App. B-22; D-6-7. The District Court then awarded identical actual damages of $7,835 on the alternative Merchandising Practices Act Count that had been tried directly to the District Court. *Id.* Under the

Act, the District Court had "discretion" to award punitive damages and attorney's fees on this statutory count. Mo. Rev. Stat. § 407.025.1. After characterizing the jury's punitive awards as "overly generous" (App. D-4), the District Court nevertheless exercised its discretion to award the same amount of punitive damages on the separate statutory count. Because it had exercised its discretion to award these "generous" punitive awards, however, it specifically refused to, in its words, "pad" those awards by also awarding separate attorney's fees, reasoning that plaintiff's 50% contingency contract provided ample compensation (in excess of $105,000) for his work. *See id.*; *see also* App. B-20.

The Eighth Circuit's February 16, 2000, opinion[1] reversed the District Court's "discretionary" decision on attorney's fees. It held that the "in its discretion" language of the Missouri Merchandising Practices Act did not allow the District Court to refuse to award attorney's fees to the prevailing party. Despite the discretionary language of the statute, and three Missouri appellate decisions expressly noting that fee awards are "discretionary" under the Act (one of which affirmed a trial court's decision, like the decision below, to deny *all* fees

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[1] An earlier opinion of the Court of Appeals had remanded the case to the District Court to consider whether the punitive damages were unconstitutionally excessive. *See Grabinski v. Blue Springs Ford*, 136 F.3d 565 (8th Cir. 1998). Despite the acknowledged fact that the punitive-to-compensatory damages ratios were 99:1 and 55:1 for the two principal defendants, the Court of Appeals concluded that the punitive awards were not unconstitutionally excessive. *Grabinski v. Blue Springs Ford*, 203 F.3d 1024, 1026-27 (8th Cir. 2000), App. A-3-5.

in view of a generous damages recovery), the Eighth Circuit reversed and remanded for an allowance of a "fully compensatory" attorney's fee award. The Court of Appeals reached this result by relying on federal authorities, including *Hensley v. Eckerhart*, 461 U.S. 424 (1983), and cases decided under the federal civil rights fee statute, 42 U.S.C. § 1988(b), which it predicted the Missouri Supreme Court would apply to state law claims under the Missouri Merchandising Practices Act. App. A-7. The Court of Appeals also affirmed the punitive damages awards, holding that they were not unconstitutionally excessive, even though its opinion notes that the two largest of these awards represent ratios of 99 times and 55 times the compensatory damages awarded.[2]

REASONS WHY THE WRIT SHOULD ISSUE

The case presents important questions about how a federal court should determine applicable substantive state law in a diversity case. Since *Salve Regina College v. Russell*, 499 U.S. 225 (1991), it has been clear that district court determinations of state law are reviewable *de novo*. But how much leeway does a federal appellate court have under such a *de novo* standard? May it ignore a federal

[2] The Court of Appeals recognized that the two largest punitive awards in the case – the $50,000 award against Sales (whose pro rata share of the compensatory damages was $507), and the $100,000 award against the Outlet (whose pro rata compensatory share was $1,832) represented punitive-to-compensatory ratios of 99 to 1 and 55 to 1 respectively. App. A-3.

district court's discretionary application of uniform, settled state law precedent from the state's intermediate courts as it tries to "predict" on appeal how a state's highest court might rule the question differently? Although decisions of this Court recognize that intermediate state appellate opinions are highly persuasive authority that should ordinarily be followed in the absence of other authority, here the Eighth Circuit reversed the District Court for following two Missouri Court of Appeals opinions that ruled the exact question now at issue. The Court of Appeals instead held that, although the Missouri statute governing punitive damages and attorney's fees expressly granted the District Court "discretion," the District Court effectively had none.

THE COURT SHOULD GRANT CERTIORARI TO EXPLAIN THOSE CIRCUMSTANCES IN WHICH FEDERAL COURTS MAY IGNORE STATE INTERMEDIATE APPELLATE AUTHORITY IN DETERMINING STATE LAW, BECAUSE THE CIRCUITS NOW USE WIDELY DIFFERING TESTS, WITH THE DECISION BELOW BEING ONE OF THE MOST EXTREME EXAMPLES OF A FEDERAL COURT REJECTING EXISTING STATE LAW IN FAVOR OF ITS OWN POLICY GOALS

The Court of Appeals' February 16 Decision extends federal civil rights law on attorney's fees into general Missouri practice without the slightest hint that the Missouri Supreme Court would do so. Despite two intermediate Missouri appellate opinions approving *complete refusals* to avoid attorney's fees under the exact Missouri statute at issue, the Eighth Circuit nevertheless predicted that the Missouri Supreme Court would follow federal

precedent to hold that a statute providing that a Missouri trial court "may, in its discretion, award attorney's fees" to a prevailing party effectively means that a Missouri court in fact *must* do so.

A federal court must apply state substantive law in diversity cases. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). But when a state's highest court has not yet ruled on an issue,[3] to what extent may a federal court ignore uniform contrary precedent from the state's intermediate courts? In a series of 1940 decisions, the Court told federal courts to *follow* decisions of state intermediate courts unless they are "convinced" by "persuasive data" that the state's highest court would decide the question differently. *See West v. AT&T*, 311 U.S. 223, 236-37 (1940) (stating that intermediate state court holdings "not to be disregarded by a federal court unless it is *convinced by other persuasive data* that the highest court of a state would decide otherwise") (emphasis added); *Stoner v. New York Life Ins. Co.*, 311 U.S. 464, 467 (1940) ("[W]here jurisdiction rests on diversity of citizenship, federal courts . . . *must follow* the decisions of intermediate state courts *in the absence of convincing evidence* that the highest court of the state would decide differently.") (emphasis added); *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 177-78 (1940) (recognizing that intermediate state courts act as organs of the state, and should be followed absent "more convincing" evidence). But the

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[3] As discussed *infra*, here the Missouri Supreme Court has at least discussed the statute at issue, and has suggested a reading of it contrary to that adopted by the Court of Appeals below.

Court has never elaborated on what sort of "persuasive data" may suffice to convince a federal court that the state's existing law would be changed. *See, e.g., Assicurazioni Generali, S.P.A. v. Neil*, 160 F.3d 997, 1002-03 (4th Cir. 1998) (attempting to define what this Court meant by "persuasive data" in *West v. AT&T*). And in the years since 1940, the Circuits have developed their own widely differing tests, frequently retreating so far from this Court's 1940 pronouncements as to suggest that very little, if any, deference to state intermediate court opinions is now required.

The extent to which the Court of Appeals here was free to ignore the uniform decisions from a state's intermediate appellate courts, and instead "predict" that these decisions would at some point be overruled by that state's highest court, is an important question on which the lower courts have taken differing approaches. At a minimum, the Court should explain the circumstances in which the federal courts may make their own "predictions" despite state intermediate court precedent to the contrary.

The Circuits vary considerably in their formulations of how much deference should be afforded to state intermediate appellate courts. Some Circuits adhere strictly to this Court's 1940 teachings, and appear reluctant to substitute their own policy preferences. *See, e.g., Nelson v. City of Irvine*, 143 F.3d 1196, 1206-07 (9th Cir. 1998) (holding that when there is no convincing evidence that the state supreme court would decide differently, a federal court is "obligated" to follow the decisions of the state's intermediate appellate courts in interpreting state law); *Perlmutter v. United States Gypsum Co.*, 54 F.3d 659, 662 (10th Cir. 1995) (stating that a "compelling reason" is

required to disregard state intermediate courts); *Trytko v. Hubbell, Inc.*, 28 F.3d 715, 719 (7th Cir. 1994) (holding that state law must be applied as declared by the state supreme court, "or in the absence of a statement by that court, by its intermediate appellate courts"); *Index Plastics Sales Co. v. United Nat'l Ins. Co.*, 23 F.3d 254, 257 n.1 (9th Cir. 1994) (finding "compelling evidence" is required to disregard state intermediate courts); *Columbia Grain, Inc. v. Oregon Ins. Guar. Ass'n*, 22 F.3d 928, 931 (9th Cir. 1994) (holding that intermediate state appellate courts' decisions "must" be followed unless the federal court is "convinced by other persuasive data that the highest court of the state would decide otherwise"); *Kirk v. Hanes Corp.*, 16 F.3d 705, 707 (6th Cir. 1994) (requiring a "strong showing" that a state supreme court would rule differently before a federal court may disregard intermediate state appellate opinions); *Kutsugeras v. AVCO Corp.*, 973 F.2d 1341, 1346 (7th Cir. 1992) (" '[A] federal court must apply the state law as declared by the highest state court or otherwise by the intermediate appellate court of the state.' ") (citation omitted).

Other Circuits, however, and even different panels within Circuits, use tests that allow them more freedom to interpose their own views of what a state's law should be. *See, e.g., Farris v. JC Penney Co. Inc.*, 176 F.3d 706, 713 (3d Cir. 1999) (stating that federal courts need merely "examine" decisions of the state intermediate courts); *Gaia Tech. Inc. v. Recycled Prods. Corp.*, 175 F.3d 365, 375 n.11 (5th Cir. 1999) (stating simply that it is "proper" to "look to" decisions of lower state courts when making an "*Erie* guess" as to how a state's highest court would decide an issue); *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1494 n.4 (9th Cir. 1996) (holding that to

predict state law, federal courts are to use decisions of state intermediate appellate courts, along with decisions from other jurisdictions, statutes, treatises, and restatements, only as "guidance"); *McGestrick v. Shoucair*, 9 F.3d 1229, 1232 (7th Cir. 1993) (noting that although federal courts are "obligated to consider" intermediate appellate courts' opinions, they are not bound to do so if the court has "good reasons" for diverging from those decisions); *Eljer Mfg. Inc. v. Liberty Mut. Ins. Co.*, 972 F.2d 805, 814 (7th Cir. 1992) (finding that federal courts are "not bound" by intermediate state appellate court decisions, and simply need "a reason" for predicting that the state's supreme court will reject them).

The Court of Appeals below did not enunciate any test to explain when it is appropriate to reject intermediate appellate court opinions. But it nevertheless felt free to disregard them, choosing instead to substitute its own policy preference for awarding attorney's fees, a preference derived solely from federal law in the civil rights context.

There was no basis, much less a convincing one, for rejecting existing Missouri law. Here the Missouri statute in question is phrased in purely discretionary terms: "The court *may, in its discretion,* award punitive damages and *may* award to the prevailing party attorney's fees. . . . " Mo. Rev. Stat. § 407.025.1 (emphasis added). Three Missouri cases have discussed the discretionary nature of this statute. In *Kawin v. Chrysler Corp.*, 636 S.W.2d 40 (Mo. banc 1982), the Missouri Supreme Court arguably decided this question when it noted that the very statute now at issue, Mo. Rev. Stat. § 407.025.1, "grants the trial court a *discretionary right* to award attorney's fees to the prevailing party. . . . " *Id.* at 45 n.4 (emphasis added). The

Supreme Court in no way limited that discretion, or suggested that fee awards should somehow be "the rule and not the exception," as federal courts have done in the civil rights context. *Compare Blanchard v. Bergeron*, 489 U.S. 87, 89 n.1 (1989) (attorney's fees may be denied under 42 U.S.C. § 1988 only when "special circumstances would render such an award unjust").

Even if the Missouri Supreme Court's decision in *Kawin* does not end the matter, two decisions from intermediate Missouri appellate courts make it plain that Missouri courts have the discretion to refuse to award *any* attorney's fees in Missouri Merchandising Practices Act cases. In *Carpenter v. Discount Motors, Inc.*, 652 S.W.2d 716 (Mo. Ct. App. 1983), the trial court did precisely what the District Court did in the present case: it refused to award *any* attorney's fees, noting that the actual and punitive awards were "ample." *Id.* at 718. The Missouri Court of Appeals affirmed that total denial of fees, expressly stating that § 407.025 "leaves little, if any, room to doubt that the ultimate decision as to whether any punitive damages or attorney fees will be granted is invested to the sound discretion of the [trial] court." *Id.* at 718.[4]

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[4] In what is clearly an alternative holding, the *Carpenter* court also decided, *after* discussing at some length and deciding the attorney's fees question, that there was a jurisdictional defect in the trial court. *Carpenter*, 652 S.W.2d at 718-19. Even if this were not an alternative holding, the fact remains that the Missouri Court of Appeals, Western District, clearly expressed its view on the discretionary nature of attorney's fees awards under the Merchandising Practices Act. This clear expression of state law stands in sharp contrast to the Court of Appeals' strained "prediction" below.

This clear Missouri stance on attorney's fees under its Merchandising Practices Act has continued. More recently, in *Sunset Pools of St. Louis v. Schaefer*, 869 S.W.2d 883, 887 (Mo. Ct. App. 1994), a different division of the Missouri Court of Appeals[5] similarly refused to award *any* attorney's fees under § 407.025.1 for a successful Merchandising Practices Act appeal. As grounds for its complete refusal to award any fees, the Missouri Court of Appeals noted simply that a fee award was "discretionary" under the statute. *Id.* In Missouri, as the District Court in the present case recognized, "discretionary" means just that.[6]

The Court of Appeals' "prediction" that the Missouri Supreme Court would interpret the word "discretionary" in the Act to effectively mean "mandatory" lacks *any* discernible support, much less the "convincing" evidence this Court has demanded before existing state appellate

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[5] The Missouri Court of Appeals is composed of three geographical districts: Western, Eastern and Southern. *See generally* Mo. Rev. Stat. §§ 477.040 *et seq.* Each District has its own judges and its own courthouse. *Id.* The Western District sits in Kansas City, the Eastern in St. Louis, and the Southern in Springfield. *Id.* The two Missouri Court of Appeals decisions ruling the question on which the Eighth Circuit disagreed were decided by two different districts, the Western District in *Carpenter* and the Eastern District in *Sunset Pools*.

[6] Although arguably not relevant after *Salve Regina*, the trial judge, the Honorable Howard Sachs, a practicing Missouri lawyer for over 25 years before becoming a Western District of Missouri federal judge in 1979 (*see* Housen, *Almanac of the Federal Judiciary*, Vol. 1, 8th Circuit, at 69-70 (Aspen Law & Publishing 2000)), expressly noted that "the approach of the Missouri courts may be somewhat more cautious than one typically finds in federal fee awards." App. D-3.

law may be ignored. The Court of Appeals had *no* data, much less *persuasive* data, to counter the uniform decisions of Missouri appellate courts. Its decision instead represents a naked policy choice to restrict the discretion of Missouri trial judges to refuse to award attorney's fees.

The Court of Appeals below, after refusing to follow existing Missouri appellate cases interpreting the statute at issue, instead seized on a 1989 Missouri Supreme Court decision, *O'Brien v. B.L.C. Ins. Co.*, 768 S.W.2d 64 (Mo. banc 1989), which it found "controlling." App. A-6. But that 11-year old decision (decided five years before *Sunset Pools*) cannot possibly have been "controlling." It addressed the question of whether a *different* statute, the Missouri odometer fraud law, one that had a *mandatory* attorney's fees provision,[7] authorized a trial court to award a relatively small amount of attorney's fees. *O'Brien's* discussion of attorney's fees focused entirely on how to compute a fee award where one is *mandated*, not on whether a Missouri statute that says "may, in its

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[7] The statute at issue in *O'Brien* was Mo. Rev. Stat. § 407.545 (now § 407.546), dealing with odometer fraud. *O'Brien*, 768 S.W.2d at 67. Unlike the discretionary statute now at issue, the odometer fraud statute interpreted in *O'Brien* provided that a defendant "*shall* be liable . . . in the case of any successful action to enforce the liability created by this section [for] the costs of the action together with reasonable attorneys fees. . . ." Mo. Rev. Stat. § 407.546 (emphasis added). The Court of Appeals' February 16 decision fails to explain what the Missouri legislature could possibly have intended when it provided in one statute that a court "shall" award attorney's fees and in another – the one at issue here – that a court "may, in its discretion" award them.

discretion" rather than "shall" somehow demands an award of fees. *O'Brien*, 768 S.W.2d at 71-72.

After concluding from its reading of *O'Brien* that the Missouri Supreme Court would be persuaded by "federal cases," the Court of Appeals then proceeded to rely exclusively on federal case law interpreting the federal civil rights fee award statute, 42 U.S.C. § 1988(b), to overcome the clearly expressed Missouri decisional law indicating that fee awards are discretionary under the Merchandising Practices Act. Missouri courts have themselves recognized the relatively narrow discretion federal courts have under the federal statute. *See Moore v. City of Park Hills*, 945 S.W.2d 1, 2 (Mo. Ct. App. 1997) (noting that a trial court's discretion is "narrow" under § 1988). But no Missouri court has ascribed a similar limitation to § 407.025. In fact, as noted, they have done the opposite. *Carpenter*, which expressly affirmed a denial of *all* attorney's fees, and *Sunset Pools*, which refused to award *any* attorney's fees on appeal, are indisputably the best evidence that Missouri allows its courts, which are considered experts on fees,[8] to refuse in their discretion to award any fees at all under the very statute now at issue.[9]

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[8] *See, e.g., Brewer v. Trimble*, 926 S.W.2d 686, 688 (Mo. Ct. App. 1996).

[9] It is not even accurate to say that the District Court awarded no fees. By its own admission, it effectively *awarded* fees by setting its own discretionary award of punitive damages on the statutory count higher than it otherwise would have. App. D-4; B-22. It thus makes no sense for the Court of Appeals to have insisted on a "fully compensatory" fee to reward Ms. Grabinski's "success." Attorney's fees were not authorized for the fraud count that was tried to the jury. And the "success" on

It was particularly inappropriate for the Court of Appeals to rest its "prediction" on federal precedent concerning attorney's fee awards in civil rights cases. The limited discretion that federal courts have to deny attorney's fees in those cases originally stemmed from the fact that damages are sometimes not available by statute, so that private litigants in civil rights cases often would have no incentive to bring actions, particularly ones for injunctive relief, unless their fees were paid. *See Newman v. Piggie Park Enter.*, 390 U.S. 400, 402 (1968). No similar rationale supports a mandatory award of fees to Ms. Grabinski, who had ample incentive to bring the present case. As the District Court noted, her counsel's 50% contingency contract stands to produce a fee in excess of $100,000 *without* an award of any additional fees. App. D-4. In any event, the federal courts' interpretation of a federal statute, even if it were identically worded, could not possibly bind Missouri courts in their interpretation of a Missouri statute. *See e.g., Johnson v. Fankell*, 520 U.S. 911, 916 (1997).

The Court of Appeals' decision flouts the *Erie* rationale. Instead of applying Missouri law to ensure consistent results in federal court and avoid forum shopping, the Court of Appeals has itself created a clear difference

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the statutory count came only when the District Court reluctantly allowed the "overly generous" punitive awards, while simultaneously denying any additional award of fees. *See* App. D-4. If the District Court in its discretion had awarded $105,000 in punitive damages and $105,000 in attorney's fees, instead of $210,000 in punitive damages and *no* fees (an essentially identical result), would the Court of Appeals still have felt free to find an abuse of discretion?

between Missouri courts and federal courts on this issue of Missouri substantive law. Despite uniform Missouri precedent allowing no attorney's fees in Missouri Merchandising Act cases, the federal courts are now on record as insisting on "fully compensatory" fee awards under that same statute. This stands the "forum shopping" rationale of *Erie* on its head. While state supreme courts are, of course, always free to change substantive law, surely there should be at least *some* indication that there is a likelihood of such a change before a federal court, under the guise of an *Erie* "prediction," imposes its own views.[10]

The Court of Appeals has taken the task of determining a state's law to a new level of speculation and surmise. Its decision conflicts with prior decisions of this Court on the level of deference to afford to a state's intermediate appellate courts, and is part of a disturbing trend in some Circuits to "predict" state supreme court opinions without any reliable data to do so. The Court should grant certiorari to explain the lengths to which federal courts may go to "predict" state law. But should the Court not consider this case to be appropriate for

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[10] It is unlikely the Missouri Supreme Court will ever directly address the issue already decided by two intermediate Missouri appellate courts (and arguably already decided by itself in *Kawin*). The Missouri Supreme Court is not a court of error. It reviews cases under a wholly discretionary "transfer" procedure that is similar to this Court's certiorari jurisdiction. *See generally* Mo. Sup. Ct. R. 83.02-83.03 (stating that Missouri Supreme Court "may" decide to review cases involving questions "of general interest and importance", appellate conflicts, or a need to reexamine existing law).

certiorari, the Court may wish to consider summary reversal in view of the clear conflict between the deference owed to state intermediate appellate courts under this Court's decisions and the complete lack of deference shown by the Court of Appeals below.

CONCLUSION

The Petition for Writ of Certiorari should be granted. Alternatively, the Court should grant certiorari and summarily reverse.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

Nos. 98-4005/4210

Vicki Grabinski,	*	
Appellant/Cross-Appellee,	*	
v.	*	Appeals from the
Blue Springs Ford Sales, Inc.;	*	United States
Blue Springs Ford Wholesale Outlet, Inc.; and Don Isom,	*	District Court for the Western District
Fred Graham, and Bob Dudley,	*	of Missouri.
Appellees/Cross-Appellants.	*	

Submitted: January 10, 2000

Filed: February 16, 2000

Before WOLLMAN, Chief Judge, and MORRIS SHEPPARD ARNOLD and MURPHY, Circuit Judges.

MORRIS SHEPPARD ARNOLD, Circuit Judge.

Vicki Grabinski sued the defendants, claiming that they violated the Missouri Merchandising Practices Act, *see* Mo. Ann. Stat. §§ 407.010-407.025, § 407.120, and acted fraudulently when they sold her an automobile that had been damaged in a collision (the three individual defendants are employees of the retailer, which, despite the

inclusion of "wholesale" in its name, is the entity that sold the car to Ms. Grabinski; the actual wholesaler, which sold the car to the retailer, merely uses "sales" in its name). This case was before us previously, *see Grabinski v. Blue Springs Ford Sales, Inc.*, 136 F.3d 565, 569-70 (8th Cir. 1998), and we held, *inter alia*, that the defendants made factual misrepresentations to Ms. Grabinski and that the amount of actual damages that the jury awarded was supported by the evidence. We directed the trial court, however, to review the punitive damage awards for excessiveness. *Id.* at 571-72. The defendants now appeal, arguing that the punitive damages awards were constitutionally excessive. Ms. Grabinski appeals the trial court's denial of her motion for attorney's fees. We affirm the judgment as to the punitive damages awards, but reverse and remand as to the attorney's fees.

I.

We turn first to the defendants' assertion that the punitive damages awards were unconstitutionally excessive. In *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996), the Supreme Court held that whether a punitive damages award is so "grossly excessive" as to violate federal due process rights depends on the proportional disparity (expressed as a ratio) between the punitive damages and the compensatory damages awarded, the civil or criminal penalties that may be imposed in "comparable" cases, and the "degree of reprehensibility" of the defendant's conduct. Although the defendants in our case argue that their net worth is also a relevant consideration, we held previously that the defendants had waived this argument. *See Grabinski*, 136 F.3d at 570.

The jury in this case awarded Ms. Grabinski actual damages in the amount of $5,300 against the retailer and its three employees jointly and severally for concealing the wreck damage. It also awarded her actual damages in the amount of $2,535 against all of the defendants jointly and severally for other concealed defects. Finally, the jury recommended, and the trial court awarded, punitive damages in the amount of $100,000 against the retailer, $50,000 against the wholesaler, and $30,000 against Don Isom, $20,000 against Bob Dudley, and $10,000 against Fred Graham (these last three being the employees).

Calculating the relevant ratios in cases where the defendants are jointly and severally liable is a matter of some difficulty, because it is not always possible to determine what each defendant will ultimately pay in compensatory damages. Ms. Grabinski urges us to divide each individual punitive damages award by the entire actual damages award. This method assumes an impossibility, however, because it posits that each defendant will ultimately pay the full compensatory damages award.

We believe, instead, that the more appropriate way of calculating the ratios is to divide the individual punitive damages awards by the individual *pro rata* shares of the actual damages. Our method is preferable, we think, because the constitutionality of a punitive damages award against a particular defendant depends partly on the amount of actual damages payable by that defendant. The individual ratios so calculated are approximately 99:1 for the wholesaler, 55:1 for the retailer, 16:1 for Mr. Isom, 11:1 for Mr. Dudley, and 5:1 for Mr. Graham. The ratio of the collective punitive damages to the collective actual damages is approximately 27:1. While these ratios are

somewhat high, *Gore* emphasizes that such ratios are not dispositive but merely instructive. *See generally United States v. Big D Enterprises, Inc.*, 184 F.3d 924, 933 (8th Cir. 1999), *petition for cert. filed*, No. 99-1010 (U.S. Dec. 3, 1999).

The second *Gore* consideration involves a comparison of the punitive damages award and the civil or criminal penalties that may be imposed for comparable misconduct, because "a reviewing court engaged in determining whether an award of punitive damages is excessive should 'accord "substantial deference" to legislative judgments concerning appropriate sanctions for the conduct at issue.' " *Gore*, 517 U.S. at 583, quoting *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 282, 301 (1989) (opinion of O'Connor, J., concurring and dissenting), itself quoting *Solem v. Helm*, 463 U.S. 277, 290 (1983). We note that the Missouri legislature has authorized significant civil and criminal sanctions for cases of fraud and concealment that are roughly comparable to the statutory violations at issue here. *See* Mo. Ann. Stat. § 407.100.6, authorizing a civil penalty of up to $1,000 for each violation, and Mo. Ann. Stat. § 407.020.3, providing that a person who, "with the intent to defraud," "willfully and knowingly engages" in any violation of the Missouri Merchandising Practices Act is guilty of a felony punishable by up to five years in prison and a fine of up to $5,000; for the various statutes authorizing these specific punishments, *see* Mo. Ann. Stat. § 557.011.2(1), § 557.011.2(2), § 557.016.1(4), § 558.011.1(4), § 560.011.1(1). In addition, *see* Mo. Ann. Stat. § 301.562.1, § 301.562.2(3), § 301.562.2(5), giving the Missouri department of motor vehicles the authority to refuse the issuance or the

renewal of a motor vehicle dealer's license to anyone who has been convicted of fraud or who has obtained money by fraud, deception, or misrepresentation. These legislative judgments weigh heavily in favor of an award of punitive damages.

Of the three considerations that *Gore* identifies as relevant to determining the constitutionality of awards of punitive damages, the reprehensibility of the defendant's conduct is generally given the greatest emphasis. *See Gore*, 517 U.S. at 575; *see also Big D Enterprises*, 184 F.3d at 933. The jury found in our case that the retailer and its three employees defrauded Ms. Grabinski by concealing prior wreck damage, and that all of the defendants concealed other defects from her. For an award of punitive damages, moreover, the instructions required the jury to determine that the defendants' conduct was "outrageous because of evil motive or reckless indifference to the rights of others." We conclude that the defendants' conduct was egregious and that it demonstrated a clear and disturbing disregard for Ms. Grabinski's safety and her economic interests.

The trial court, after a careful application of the principles outlined in *Gore*, ruled that "while the punitive damages award was 'generous' as to the various defendants, it was far from 'grossly excessive' as to any of them." We think, for the reasons indicated, that there is ample support in the record for this finding and therefore affirm the trial court on this issue.

II.

We turn now to Ms. Grabinski's claim that the trial court erred when it refused to grant her request for roughly $125,000 in attorney's fees. In a diversity case such as this, absent a conflict with a federal statute or court rule, we apply state law concerning the availability of attorney's fees. *See generally Lamb Engineering and Construction Co. v. Nebraska Public Power District*, 103 F.3d 1422, 1434 (8th Cir. 1997). The applicable state statute in this case, *see* Mo. Ann. Stat. § 407.025.1, provides that a trial court "*may* award to the prevailing party attorney's fees, based on the amount of time reasonably expended" (emphasis supplied). Although the statutory provision contains discretionary language, Ms. Grabinski argues that the Missouri Supreme Court has limited the trial court's ability to refuse fees under this section. We agree.

The defendants maintain that *Carpenter v. Discount Motors, Inc.*, 652 S.W.2d 716 (Mo. Ct. App. 1983), provides the appropriate guidance here. The discussion of attorney's fees in that case, however, *id.* at 717-18, was part of a cursory alternative holding that approached *dictum*, and the appellate court's main ruling was that the trial court lacked subject-matter jurisdiction, *id.* at 718. We find, moreover, that the more recent Missouri Supreme Court decision in *O'Brien v. B.L.C. Insurance Co.*, 768 S.W.2d 64 (Mo. 1989) (*en banc*), is controlling on the issue of when attorney's fees should be awarded under Mo. Ann. Stat. § 407.025.1.

Although *O'Brien* involved the attorney's fees provision of a different statute from the one applicable here, namely, Mo. Ann. Stat. § 407.545.1 (West 1979, repealed

1989), we nevertheless think that *O'Brien* is apposite authority. The relevant statute in *O'Brien* provided that "[a]ny person who, with intent to defraud, violates any of the provisions of [certain statutes] *shall be liable* . . . in the case of any successful action to enforce the liability . . . [for] reasonable attorney fees" (emphasis supplied). That statute, as the trial court in our case pointed out, appeared to mandate attorney's fees in successful actions. But the *O'Brien* court never alluded to that fact in deciding the case; instead, it relied on certain United States Supreme Court cases interpreting 42 U.S.C. § 1988(b) in deciding whether and under what circumstances an award of attorney's fees is appropriate. *See O'Brien*, 768 S.W.2d at 71.

We think that it is important to note that the wording of 42 U.S.C. § 1988(b) is identical in every material respect to that of Mo. Ann. Stat. § 407.025.1, the statute applicable in our case: The federal statute provides that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee," and the Missouri statute provides that "[t]he court . . . may award to the prevailing party attorney's fees, based on the amount of time reasonably expended." Since the Missouri Supreme Court in *O'Brien* used federal cases to determine when fees are due under a state statute that evidently mandated an award of fees, we think that there is even more reason to expect that it would use such cases when deciding an attorney's fees award under a statute with discretionary language virtually identical to that contained in § 1988(b). We therefore conclude that cases involving § 1988(b) provide the appropriate guidance in § 407.025.1 attorney's fees cases.

We also conclude that the trial court abused its discretion when it denied Ms. Grabinski attorney's fees simply because it felt that the punitive damages award was "generous" and because it did not want to " 'pad' the punitive damage award with a fee award in this case." The Supreme Court has emphasized that the results that a plaintiff achieves are a critical consideration in deciding whether to award attorney's fees. *See, e.g., Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983), a case that the Missouri Supreme Court relied on in *O'Brien*, 768 S.W.2d at 71. Ms. Grabinski enjoyed very significant success in this litigation. Awarding attorney's fees to successful plaintiffs is indeed the rule rather than the exception. *See generally Moore v. City of Park Hills*, 945 S.W.2d 1, 2 (Mo. Ct. App. 1997); *see also Blanchard v. Bergeron*, 489 U.S. 87, 89 n.2 (1989), a case relied on in *O'Brien*, 768 S.W.2d at 71. Denying fees because Ms. Grabinski received "generous" punitive damages stands the matter entirely on its head because it punishes her for her success, the very thing that is supposed to be rewarded.

III.

For the reasons indicated, we affirm the trial court's punitive damages award and reverse the trial court's denial of Ms. Grabinski's motion for attorney's fees. We remand the case to the trial court with directions to award Ms. Grabinski a "fully compensatory fee," *Hensley*, 461 U.S. at 435. We also award Ms. Grabinski the costs of this appeal and the attorney's fees occasioned on account of this appeal. Her bill of costs and request for attorney's

fees, with proper documentation, should be filed with the clerk of court.

A true copy.

Attest.

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

VICKI GRABINSKI, Plaintiff, v. BLUE SPRINGS FORD SALES, INC., et al., Defendants.	)	No. 93-1209-CV-W-6 (Filed Oct. 27, 1998)

MEMORANDUM AND ORDER

The case is on remand from the Circuit. *See Grabinski v. Blue Springs Ford*, 136 F.3d 565 (8th Cir. 1998). Before the court are two fairly narrow tasks. First, the court must assess the constitutionality of the punitive damage awards. *Id.* at 572. Second, the court must evaluate the propriety of attorney's fees for plaintiff's counsel. *Id.* Pursuant to this court's earlier directive, the parties have recently each supplied briefing on these two issues. The facts are adequately presented in the Circuit's opinion and will not be repeated here. *Id.* at 566-69.

The court will, however, briefly recap the pertinent procedural history. Following a ten day jury trial, plaintiff submitted claims of fraudulent misrepresentation (Count I) against the Wholesale Outlet, four of the Wholesale Outlet's employees, and Blue Springs Ford ("BSF"). On October 25, 1994, the jury awarded actual damages of $5,300 on the fraud claim for concealing prior wreck damage against the Wholesale Outlet and three of the

employees, Isom, Graham and Dudley. The jury awarded actual damages of $2,535 on the fraud claim for other concealed defects, separate and apart from prior wreck damage, against BSF, the Wholesale Outlet and the three employees noted above. The jury awarded punitive damages as follows: $100,000 against the Wholesale Outlet, $30,000 against Isom, $20,000 against Dudley, $10,000 against Graham, and $50,000 against BSF. The total punitive recovery was $210,000.

The Missouri Merchandising Practices Act claim (Count V) was submitted to the court.[1] Citing "equitable considerations," *see* Memorandum and Order of March 26, 1996, at 2, the court entered judgment on that claim in the identical amounts of actual ($7,835) and punitive ($210,000) damages that the jury awarded on the fraud claim. *Id.* at 5. The court declined to award plaintiff attorney's fees on the Merchandising Practices Act claim, citing the large punitive damages award. *Id.* at 2-3.

Both sides appealed. The Circuit affirmed generally but remanded the case to this court with instructions to "review . . . the punitive damages awards under state and federal excessiveness standards." *Grabinski*, 136 F.3d at 572 (8th Cir. 1998). The Circuit dismissed as moot plaintiff's cross-appeal on the issue of attorney's fees, stating that:

> On remand, Ms. Grabinski can bring to the district court's attention the cases of *O'Brien v. B.L.C. Ins. Co.*, 768 S.W.2d 64, 71 (Mo. 1989) (*en banc*), and *Moore v. City of Park Hills*, 945 S.W.2d

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[1] This claim is alternatively referred to throughout this Memorandum and Order as the "statutory claim."

> 1, 2-3 (Mo. Ct. App. 1997), which deal with attorney fees, and *AT & T v. United Computer Systems, Inc.*, 98 F.3d 1206, 1211 (9th Cir. 1996), which deals with the entry of judgment after remand.

Grabinski, 136 F.3d at 572.

The court will dispose of the punitive damages issue first. Defendants argue that both the jury's punitive damages award on the fraud claim and this court's punitive damages award on the Merchandising Practices Act claim, which merely mirrors the jury's award, are constitutionally excessive.[2] Relying on their interpretations of lower court cases applying the Supreme Court's decision in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), defendants strenuously argue that the maximum constitutionally permissible ratio of punitive to actual damages is 10:1. See Defendants' Remand Brief at 10-16. Defendants further suggest that this court should reduce the punitive damages award to ten times the pro rata share of actual damages against each defendant on the fraud claim and award only nominal damages on the statutory claim. Defendants include in their brief two charts. *See* Defendants' Brief on Remand at 17. The first shows the ratio of punitive to actual damages for each defendant based on the original punitive damage amounts awarded by the jury and that defendants' self-allocated share of actual damages. As revealed by that chart, the ratio is 99:1 for Blue Springs Ford, 53:1 for the Wholesale Outlet,

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[2] Common law excessiveness is not briefed and is summarily ruled in favor of plaintiff.

16:1 for Isom, 11:1 for Dudley and 5:1 for Graham.[3] For her part, plaintiff cites authority that she suggests stands for the proposition that the ratio of punitive to actual damages may and has exceeded 10:1 in post-*Gore* cases. *See* Plaintiff's Remand Brief at 1-5.

This court has reviewed the parties' briefing and the cited authorities. Before appeal, I stated that "[i]f anything, I view the punitive damages awards as overly generous." *See* March 26, 1996, Order at 3. I stand by that characterization, but nevertheless conclude that the jury's award did not cross into constitutionally forbidden territory. As I stated in my July 13, 1998, Order, the constitutionality of the jury's award was "largely assumed before." This is true not only because this court itself entered a punitive damages award in an amount equal to that of the jury's, but also because, as shown below and suggested in this court's July 13, 1998, Order, this case is simply not one in which an unconstitutional injustice has been done, given the court's understanding of the factual conclusions the jury was entitled to make and the inferences it was permitted to draw based on the evidence before it.

Preliminarily, I note that contrary to the hope of many defendants, and perhaps the inference drawn by

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[3] The second chart adjusts each defendant to a 10:1 ratio of punitive to actual damages. As revealed by that chart, the amount of punitive damages for Blue Springs Ford would be $5,070, the Wholesale Outlet $18,320, Isom $18,320, Dudley $18,320 and Graham $10,000.

some judges, I do not view *Gore* as revolutionizing punitive damage practice, inviting or requiring frequent intrusive judicial intervention to establish ceilings on discretionary awards by juries. On the contrary, the course of litigation in the Supreme Court has been marked by considerable caution, emphasizing the wide discretion juries have exercised in recent decades in granting such damages. *Gore* simply signaled, for the five Justice majority, that there are limits, and that the $4 million dollar award, reduced to $2 million by the Alabama Supreme Court, was simply outlandish as a recovery for undisclosed repainting of a new automobile. The principal significance of *Gore*, in my judgment, was its "states rights" ruling, whereby the state law of one state could not be used to deter misconduct occurring or having its effect nationwide.

The court must therefore reject defendants' repeated suggestions that this court adopt their 10:1 ratio analysis. While this approach – properly applied, *see infra* – has some surface appeal, it must yield to the Supreme Court's cautionary statement that "the constitutional line [may not be] marked by a simple mathematical formula." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 582 (1996). "[W]hile a 'shocking disparity' in the ratio between an award of punitive and actual damages may suggest that the punitive damages award is unconstitutional," other considerations often will lead to a different conclusion. *Pulla v. Amoco Oil Co.*, 72 F.3d 648, 659 (8th Cir. 1995) (citing *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 462 (1993)). As recently noted by the Eighth Circuit in *Dean v. Olibas*, 129 F.3d 1001, 1007 (8th Cir. 1997), *TXO* upheld a punitives award 526 times greater than the

actual damages. It would be entirely inappropriate for this court to measure punitive damages awarded by a jury with a fixed constitutional yardstick such as defendants' 10:1 ratio.

Rather than the mere application of a purely mathematical formula, this court must start from the presumption that " 'a judgment that is a product of [fair procedures] is entitled to a strong presumption of validity,' " whatever the resulting ratio. *Dean*, 129 F.3d at 1006 (*quoting TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 454 (1993)). With this presumption as its beginning, this court, as explained in *Gore* and *Dean*, is to determine whether a punitive damages award is so "grossly excessive," 517 U.S. at 562, as to violate federal due process rights, by considering such things as "the degree of reprehensibility of the defendant's conduct," *id.* at 575, the ratio of punitive damages to compensatory damages, *id.* at 577-81, and "the civil or criminal penalties that could be imposed for comparable misconduct," *id.* at 583.[4]

The ratio of punitive to actual and potential damages (the second factor) does not render the jury's verdict constitutionally infirm. The court views the ratios supplied by defendants – particularly the 99:1 and 53:1 ratios

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[4] I do not understand that the Court majority in *Gore* was intending to preclude other considerations – such as deterrence of a defendant *and others* – traditionally used in imposing punitive damages. *See* MAI 10.01 (5th edition). My supposition is that the outcome of this case will be widely noted by car dealers in Missouri and particularly in the metropolitan area of Kansas City.

for BSF and Wholesale Outlet, respectively – as misleading. Taken at face value, they might have a tendency to improperly color and skew the court's analysis.

To begin, I respectfully disagree with the district court ruling in Texas, *Cimino v. Raymark Industries, Inc.*, 751 F.Supp. 649, 657-58 (E.D. Tex. 1990), if construed to favor splitting liability into segments when defendants are jointly and severally responsible for the harm done and a jury has not itself apportioned percentage fault. After that adjustment, the ratio for BSF is about 20:1 ($50,000/$2,535) and the ratio for the Wholesale Outlet about 13:1 ($100,000/$7,535). As discussed, *infra*, neither of these ratios is unconstitutionally outlandish when other factors are considered.[5]

Even if some sort of division of the damages award was appropriate in figuring the ratios, the arbitrary decision to allocate damages equally amongst the culpable defendants would be unacceptable. For example, defendants' approach allocated the $2,535 actual damage award for misrepresentations about the overall condition of the vehicle equally among the five defendants that the jury found liable.

The most extreme ratio is that for Blue Springs Ford, which was assessed punitive damages of $50,000 for a 99:1 ratio of punitive to actual damages. While it would be acceptable for defendants to divide up payment responsibilities amongst themselves on an equal basis,

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[5] The resulting ratios for the individual defendants are not even borderline suggestive of unconstitutionality, and the court will not discuss them further in this order.

the jury was presented with strong evidence that would have permitted it to conclude that Blue Springs Ford should shoulder significantly more responsibility than a 1/5 share.[6] Indeed, it was BSF's used car manager who examined and test drove the vehicle. He told Isom at the Wholesale Outlet that it was "very nice," was "driving fine" and needed only a cleanup and standard servicing. *See Grabinski*, 136 F.3d at 567. Based on this type of evidence, when there were numerous serious problems with the car's performance, and it was permissible for the jury to conclude that BSF intended that its reckless endorsement be conveyed to potential purchasers, it is clear that BSF should face stiff punishment for being the instigator of the misrepresentations in this case. The jury was justified in seeking to deter in a striking manner similarly deceitful tactics in other instances.

The defendants' ratio analysis also improperly uses as the denominator only the actual damages plaintiff suffered. It is permissible to use potential harms, as well as actual ones, when figuring the ratio. *See Gore*, 517 U.S. at 582. As the Supreme Court stated in *Gore*, "low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages." *Id. See also Dean v. Olibas*,

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[6] Consistent with this position, plaintiff argues that BSF got "disproportionately light" treatment and urges the court to *increase* the punitive damages award against BSF. *See* Plaintiff's Remand Brief at 4-5. After consideration, the court declines plaintiff's invitation. *But see infra*, n. 16.

129 F.3d 1001, 1007 (8th Cir. 1997) ("[I]n imposing punitive damages it is proper to consider not only the harm that actually resulted from the defendant's misdeeds but also the harm that might have resulted."). In this case, the sport-utility vehicle at issue had been "totalled" in a rollover accident. Plaintiff argued to the jury that it was repaired improperly and would have been unsafe in the event of another rollover accident. There was further evidence introduced about the vehicle's reduced emergency handling capabilities. Plaintiff also testified about the vehicle losing power on the highway (which could have caused an accident), overheating (which could have left plaintiff stranded in a remote location) and dangerous side-to-side swaying (which could have caused an accident). For these reasons (and others not articulated herein but present in the record), the potential harms faced by plaintiff and passengers during the time she drove the car were not measurable by the recovery of actual damages. In addition to the potential physical harms, plaintiff presumably suffered non-compensable mental stress in dealing with a car saddled with serious mechanical problems. *See Dean*, 129 F.3d at 1007 (citing emotional damage caused by defendant).[7] These are other reasons the court concludes that the simplified ratios supplied by defendants are quite misleading.

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[7] Some of the jurors would doubtless conclude that they would not be willing to take $2,500 for the long period of exasperation that was obvious from the evidence.

Even if the ratios were somewhat high, however, the reprehensibility of defendants' conduct supplies a constitutionally sufficient explanation.[8] The jury undoubtedly wanted to deter BSF from misrepresenting the condition of "lemons." Deterring such conduct and thereby protecting future customers of BSF (and the Wholesale Outlet) within the greater metropolitan Kansas City area was and is a laudible objective, appropriate on the facts of this case. Dealing in lemons is bad enough; lying about their condition may be worse. Such reprehensible conduct deserves to be punished, and the jury was entitled to send a stern signal to BSF that such conduct is unacceptable. For a rather prominent car dealership, the dollar amount needed to be high enough and the message loud enough to be heard. The amount is not so high as to be unconstitutional. Defendants would have the court disregard, unrealistically, the potential harm to scores of automobile buyers from tolerating dealership misconduct in this case, or limiting recoveries to the actual damage suffered by one person. The deterring purpose of punitive damages should take into account the effect on the defendant of the award, which should be sufficient in size to stop a bad practice from recurring.

The third factor – a comparison of the award to applicable civil or criminal penalties – may somewhat favor defendants but is not suggestive of constitutional

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[8] The Supreme Court has indicated that the degree of reprehensibility is "[p]erhaps the most important indicium of the reasonableness of a punitive damages award." *Gore*, 517 U.S. at 575.

infirmity. The Missouri Merchandising Practices Act contains at least two pertinent provisions. Mo.Rev.Stat. § 407.100.6 authorizes a court to enter as a civil penalty up to $1,000 per "violation" in suits instituted by the attorney general. Although what constitutes a "violation" is not statutorily defined, the court concludes – contrary to defendants' assertion in briefing – based on *State ex rel. Nixon v. Consumer Automotive Resources, Inc.*, 882 S.W.2d 717 (Mo. Ct. App. 1994) (imposing a separate $200 penalty for each person victimized by a pyramid scheme), that there would be discretion to impose a separate $1,000 fine for each separate misrepresentation and misdeed of defendants.

Even more severe is the other applicable section, Mo. Rev. Stat. § 407.020.3. It provides that "Any person who willfully and knowingly engages in any act, use, employment or practice declared to be unlawful by this section with the intent to defraud shall be guilty of a class D felony." A class D felony is punishable by a term of prison up to five years, *see* Mo. Rev. Stat. § 558.011, unless the defendant is a repeat offender, in which case the prison term can be up to ten years, *see* Mo. Rev. Stat. § 558.016. As for the corporate defendants, a fine of up to $10,000 may be imposed for each felony conviction. *See* Mo. Rev. Stat. § 560.021. In the case of continuous violations, a court may order the corporate death penalty (*i.e.*, charter revocation), the severest possible corporate sanction. *See* Mo. Rev. Stat. § 351.494. In short, while the punitive damages award was "generous" as to the various defendants, it was far from "grossly excessive" as to

any of them.[9] The court thus reaffirms what was implicit before appeal, that the jury's award was not unconstitutionally severe. The jury's punitive damages awards against each of the various defendants was not unconstitutional and will remain unchanged.[10] For the same reasons, this court's award of punitive damages on the statutory claim in the same amounts was not unconstitutional.

Defendants suggest that this court should exercise its discretion to reduce the amount awarded on the statutory claim. Assuming without deciding that the court has the authority to revisit the issue, which is by no means clear,[11] the court stands by its decision to assess punitive damages on the statutory claim in amounts equal to those assessed by the jury on the fraud claim. The court notes that prior to the appeal it concluded that " 'equitable'

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[9] The court easily concludes that state excessiveness standards have not been violated in this case. *See generally* Plaintiff's Remand Brief (discussing authorities).

[10] It would have been useful if the parties had introduced financial information. A $50,000 award against a prominent business entity is hardly out of line, under the circumstances.

[11] The court is not sure whether it has this authority post-appeal. Plaintiff argues that this court does not possess such authority and that adjusting the punitive amounts would constitute error. On the other hand, defendants suggest that the court may review the punitive awards other than for constitutional error. The court's review of the Circuit's opinion suggests that this issue is *not* one that the Circuit intended for this court to address on remand. However, because the court reaches the same result it did previously and because plaintiff certainly cannot fault this court for doing so, the court undertakes a review, albeit a brief one.

considerations" precluded it from reaching a result on punitive damages on the statutory claim different than that reached by the jury on the fraud claim. *See* March 26, 1996, Memorandum and Order at 2 (citing authorities).[12]

The court relied on cases holding that when a jury has decided a factual question, a court is precluded from second guessing that decision when it later considers a claim submitted to the bench. *See* March 26, 1996, Memorandum and Order at 2. Each of the two principal cases the court relied on involved a jury's verdict on a § 1983 claim followed by a bench decision on a Title VII claim. *See Sorlocco v. New York City Police Dept.*, 971 F.2d 864, 873-74 (2d Cir. 1992) (holding that district court was "collaterally estopped" from deciding Title VII claim differently than jury decided § 1983 claim; stating "when a jury has decided a factual issue, its determination has the effect of precluding the court from deciding the same fact issue a different way"); *Kitchen v. Chippewa Valley Schools*, 825 F.2d 1004, 1014 (6th Cir. 1987) (same). The case cited by the Circuit, *Brownlee v. Yellow Freight System, Inc.*, 921 F.2d 745, 749 (8th Cir. 1990), stands for the same proposition. The Circuit's opinion, however, may suggest that this court is not bound under this law to enter punitive damage awards on a bench claim in amounts parallel to those entered by the jury – which decided a different

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[12] The wording may have been badly chosen and evidently caused some confusion in the Circuit. As best I can remember, I meant merely that – pursuant to this court's view of the case law and as a matter of this court's discretion – judgment on the statutory count should parallel that of the jury so long as the jury did not act unconstitutionally (which I had implicitly concluded did not happen).

claim but one based on the same operative facts – because punitive damages are a legal remedy, not an equitable one.[13] I doubt that I have been so directed, where I find no excessiveness. When a jury returns a verdict assessing damages based on particular conduct, the damages determination itself is a factual conclusion to which the doctrine of collateral estoppel applies with full vigor. *See, e.g., Richardson v. Phillips Petroleum Co.*, 791 F.2d 641 (8th Cir. 1986); *Oldham v. Pritchett*, 599 F.2d 274 (8th Cir. 1979). *See also Chew v. Gates*, 27 F.3d 1432 (9th Cir. 1994); *Kathios v. General Motors Corp.*, 862 F.2d 944 (1st Cir. 1988); *Terry Properties, Inc. v. Standard Oil Co. (Ind.)*, 799 F.2d 1523 (11th Cir. 1986). Jury determinations of punitive damages are not an exception. *See, e.g., Trevino v. Gates*, 99 F.3d 911, 923-24 (9th Cir. 1994). Thus, assuming that the court and not the jury was entitled to rule on the statutory claim,[14] it would be and was bound to enter punitive damages awards parallel to those entered by the jury, barring common law or constitutional excessiveness.

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[13] *See Grabinski*, 136 F.3d at 571 ("To the contrary, the trial court held that it was bound by 'equitable considerations' to enter judgment in accordance with the verdicts, relying on the principle that a court is collaterally estopped from relitigating a jury's factual findings when the court later considers equitable remedies on the same claim. [*Brownlee, supra*] That reliance was misplaced. Not only are punitive damages a legal remedy, but the trial court had a duty under state and federal law to review the awards for excessiveness.").

[14] *See infra* n. 15.

In any event, whether as a matter of collateral estoppel, *see supra,* discretion, *see infra;* or comity,[15] this court stands by its decision to assess punitive damages on the statutory claim in amounts equal to those assessed by the jury.[16]

The court also, contrary to the view expressed during an in-chambers meeting some months ago and before a close review of pertinent case law, reaffirms its decision

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[15] Although not raised as an issue on appeal, the Circuit pointed out that this court should have submitted the issue of punitive damages on the statutory claim to the jury in this diversity action even though under state law the matter is one for the court. *See Grabinski,* 136 F.3d at 571 (*citing Kampa v. White Consol. Indus., Inc.,* 115 F.3d 585, 587 (8th Cir. 1997), and *Gipson v. KAS Snacktime Co.,* 83 F.3d 225, 230 (8th Cir. 1996)). In other words, if the matter had been handled correctly by this court the first time, the statutory punitives question would have been sent to the jury. Notwithstanding the rather remarkable situation found in *Bird v. John Chezik Homerun, Inc.* 152 F.3d 1014 (8th Cir. 1998), which the Circuit corrected, I must assume that the jury would have assessed punitives on the statutory claim in the same amounts. This is yet another reason why punitive awards should parallel those awarded by the jury.

[16] For the guidance of the parties and the information of the Court of Appeals (assuming the parties continue to litigate as far as they can go) I note that if I felt entirely free to disagree with the jury findings, in deciding the statutory count, I would probably find BSF guilty of fraudulently concealing probable knowledge or reckless disregard of the fact that the automobile had been wrecked, and on that basis would award punitive damages in an amount more like that awarded against the Wholesale Outlet. Without such element of fraud, I would likely award no more than $25,000 for selling a "lemon" as a sound vehicle, if I accepted the theory of fraud in that regard. I would also probably reduce somewhat the punitive damage award as to some of the individual defendants.

to deny the roughly $125,000 in fees sought by plaintiff in this matter. *See* Defendants' Response to Plaintiff's Supplemental Attorney's Fees Submission at 2. Both sides agree that counsel is entitled to attorney's fees, if at all, under Mo. Rev. Stat. § 407.025, which provides in relevant part, "The court *may*, in its discretion, award punitive damages and *may* award to the prevailing party attorney's fees, based on the amount of time reasonably expended, and may provide such equitable relief as it deems necessary or proper." (emphasis added). Nine years after § 407.025 was enacted, the Missouri Supreme Court noted that it "grants the trial court a *discretionary right* to award attorney's fees to the prevailing party in an action for violation of § 407.020." *Kawin v. Chrysler Corp.*, 636 S.W.2d 40, 45 n. 4 (Mo. banc 1982) (emphasis added). The next year, the Missouri Court of Appeals in *Carpenter v. Discount Motors, Inc.*, 652 S.W.2d 716 (Mo. Ct. App. 1983), affirmed a trial court's decision not to award attorney's fees under § 407.025 when the jury award was "more than ample to compensate plaintiff under the circumstances." *Id.* at 717. In doing so, the Court of Appeals stated that § 407.025 "leaves little, if any, room to doubt that the ultimate decision as to whether any punitive damages or attorney fees will be granted is invested to the sound discretion of the court." *Id.* at 718. For more discussion of *Carpenter, see* this court's March 26, 1996, Memorandum and Order at 2.

Based on the plain language of § 407.025, the language in *Kawin* and the *Carpenter* decision, this court exercised its discretion to deny plaintiff attorney's fees. *See* March 26, 1996, Memorandum and Order at 2-3. As previously noted, the Circuit dismissed plaintiff's appeal

of this decision as moot. In doing so, the Circuit suggested that plaintiff bring to this court's attention *O'Brien v. B.L.C. Ins. Co.*, 768 S.W.2d 64, 71 (Mo. banc 1989), and *Moore v. City of Park Hills*, 945 S.W.2d 1, 2-3 (Mo. Ct. App. 1997).[17] This court might consider such a statement in a Circuit opinion as a well-placed hint for action on remand. This may have been what the Circuit meant in this case, without close examination of the citations or the ability to forecast the other recoveries. If so, I respectfully feel compelled to reach another result.

The first case cited by the Circuit is *O'Brien*. There, plaintiff brought suit for, among other claims,[18] odometer fraud. After the jury returned a verdict in favor of plaintiff, the trial court entered "$4,000 statutory treble damages for the odometer violation pursuant to § 407.545, RSMo 1978, and for $1,000 attorneys' fees *pursuant to the same statute.*" *O'Brien*, 768 S.W.2d at 67 (emphasis added). Section 407.545, which was repealed in 1983, provided that "Any person who . . . violates any of the provisions of sections 407.510 to 407.555 [Mileage Recorders (Odometers) Altering or Resetting Prohibited] *shall be liable* in civil damages . . . *and*, in the case of any successful action to enforce the liability created by this section, the costs of the action together with reasonable *attorney fees* as

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[17] These were the only cases discussed in plaintiff's brief. Plaintiff did refer to one other case, but it was a Kansas case and had no bearing on the issues before the Circuit.

[18] The other causes of action asserted by the *O'Brien* plaintiff have no bearing on the discussion.

determined by the court." (emphasis added).[19] Thus, given the mandatory language of § 407.545 and as this court recognized before the appeal, *O'Brien* bears only on "the calculation of a fee award and does not deal with the *Carpenter* issue. . . . " March 26, 1996, Memorandum and Order at 3 n. 2.

Plaintiff's briefing on the cross-appeal stated that the *defendants* called *O'Brien* "the only Missouri case which has extensively addressed the attorney fee issue under Mo.Rev.Stat. § 407.025." Brief of Plaintiff/Cross-Appellant at 47. Plaintiff made no effort to explain that defendants' characterization of *O'Brien*[20] was in error. In their response, defendants failed to point out that *O'Brien* was decided under the mandatory language of § 407.545. *See* Appellant's Reply Brief and Brief of Cross-Appellees at 18.[21] In light of the Circuit's decision to deny plaintiff's appeal as moot, it is understandable that this sort of mistake could slip through the proverbial crack. In any event, the court reaffirms its earlier position that *O'Brien* has no bearing on this court's discretion on whether to award fees in the first place.

As for *Moore*, the court also views it as of no value to the issues here. There, plaintiffs brought suit against the

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[19] Section 407.545's replacement, Mo.Rev.Stat. § 407.546, contains the same mandatory language.

[20] Assuming, of course, that plaintiff's counsel accurately stated defendants' position; the court cannot find this alleged statement in the record, and plaintiff's counsel provided no citations in briefing before the Circuit.

[21] Defendants' current briefing is consistent with my analysis.

City of Park Hills, the mayor of Park Hills and a police officer under 42 U.S.C. § 1983 for alleged violations of their first and fourteenth amendment rights in towing plaintiffs' trailer from their property without prior notice. A jury awarded damages against Park Hills and the police officer in the amount of $50,000 and $25,000, respectively. The trial court denied plaintiffs' request for $18,700 in attorney's fees under § 1988, citing the generous compensatory award. The Missouri Court of Appeals followed United States Supreme Court precedent in holding that the discretion given to a trial court under § 1988 is extremely narrow, permitting a denial of fees only when " 'special circumstances would render such an award unjust.' " *Moore*, 945 S.W.2d at 2 (*quoting Blanchard v. Bergeron*, 489 U.S. 87, 89 n. 1 (1989)).

The *Moore* decision is undoubtedly a sound statement of *federal* civil rights law. This court, however, previously recognized that the "approach of the Missouri courts may be somewhat more cautious than one typically finds in federal fee awards. . . . " March 26, 1996, Memorandum and Order at 2. Neither *O'Brien* nor *Moore* may be read to signal a change in this cautious approach. While it may be that in the future Missouri appellate courts will tighten the discretion vested in lower courts by 407.025, *Kawin* and *Carpenter*, or will harmonize fee recovery law despite the difference in statutory language, this court must follow Missouri law as it finds it now. To do otherwise would be to engage in speculation. *Vargus v. Pitman Mfg. Co.*, 675 F.2d 73, 76 (3d Cir. 1982) (federal courts should not attempt to predict that state appellate courts will reverse course on established law). The court also notes that the Circuit's recent decision in *Bird v. John*

Chezik Homerun, Inc., 152 F.3d 1014 (8th Cir. 1998), which directed the district court to enter an actual damage award on a Merchandising Practices Act claim in the same amount as the jury found appropriate on a common law fraud claim but did *not* require the district court to give the same treatment to the jury's punitive award, confirms that wide discretion exists under § 407.025. There is no reason to treat punitive damages discretion differently than attorney's fee discretion.

Thus for the same reasons cited in the court's March 26, 1996, Memorandum and Order at 3, the court reaffirms its discretionary decision to deny attorney's fees in this matter. *See also* Defendants' Brief on Remand at 19 (citing reasons). The court further notes that a copy of the "Contract For Legal Services" between plaintiff and counsel found in plaintiff's appendix on appeal states that plaintiff must turn over to plaintiff's counsel 50% of any "net recovery" obtained. "Net recovery" is "the gross recovery (including attorney's fees awarded) less expenses incurred directly related to the litigation process." Thus, even absent an award of attorney's fees from this case, plaintiff's counsel stands to earn over $100,000 (half of roughly $218,000), plus interest, for his work in this case. Plaintiff's recovery will also be over $100,000, plus interest. These amounts represent more than ample compensation in what the court has always thought should have been a rather straightforward case of fraudulent salesmanship.[22]

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[22] As a matter of information to counsel and the Court of Appeals, if I were mandated to allow fees of some $125,000, I would wish to exercise discretion as to punitive damages by

Lastly, the court takes up the case of *AT&T v. United Computer Systems, Inc.*, 98 F.3d 1206, 1211 (9th Cir. 1986). It is regrettable that judgment on the jury's verdict was not entered until seventeen months later. As this court understands the law, however, it does not have the authority to enter a nunc pro tunc judgment. *See Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990) (post-judgment interest must be calculated from the date of judgment, not date of verdict, under plain language of 28 U.S.C. § 1961); *Magee v. United States, Lines, Inc.* 976 F.2d 821, 823-24 (2d Cir. 1992) (vacating lower court's nunc pro tunc post-judgment interest order in light of *Kaiser*).[23] Contrary to plaintiff's urging on appeal, *AT&T* does not alter that understanding. Therefore, plaintiff appears entitled to post-judgment interest, if it all, from March 26, 1996, forward. *AT&T* does suggest that plaintiff may be entitled to interest from March 26, 1996, forward as a matter of fairness, even though the case was remanded. This seems appropriate, especially considering that defendants lost on appeal, *see AT&T, supra* at 1211, and this court has simply reaffirmed the actions it took earlier respecting punitive damages and attorney's fees.

Accordingly, it is hereby

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disallowing them on the statutory claim. Enough is enough. Plaintiff would presumably elect to take the larger sum under the fraud claim.

[23] To the extent a ruling of the Circuit may be to the contrary, it was decided prior to the cited Supreme Court decision. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Knudsen*, 749 F.2d 496, 497 (8th Cir. 1984).

ORDERED that a revised final judgment be entered on each of Counts I and V for actual damages against Blue Springs Ford Sales, Inc. for $2,535 and punitive damages for $50,000; against Blue Springs Ford Wholesale Outlet for actual damages $7,835, and punitive damages $100,000; against defendant Isom for actual damages, $7,835, and punitive damages $30,000; against defendant Dudley for actual damages, $7,835, and punitive damages, $20,000; against defendant Graham for actual damages, $7,835, and punitive damages, $10,000; and in favor of defendant Ridings. Pursuant to 28 U.S.C. § 1961, post-judgment interest on these amounts accrued beginning on March 26, 1996, and shall continue to accrue until the judgments are paid in full.

/s/ Howard F. Sachs
HOWARD F. SACHS
UNITED STATES
DISTRICT JUDGE

Dated: Oct 27, 1998.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 98-4005WMKC

Vicki Grabinski, Appellant, v. Blue Spring Ford Sales, Inc., et al., Appellees.	* * * * * * * * *	Order Denying Petition for Rehearing and for Rehearing En Banc

The Petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

March 21, 2000

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals,
Eighth Circuit

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

VICKI GRABINSKI, Plaintiff, v. BLUE SPRINGS FORD SALES, INC., et al., Defendants.	)	No. 93-1209-CV-W-6 (Filed March 26, 1996)

MEMORANDUM AND ORDER

After an unusually contentious trial, on October 25, 1994, the jury rendered a special verdict for actual and punitive damages in this case, sufficient for entry of judgment on Count I of the complaint. On May 12, 1995, the court denied defendants' contention that plaintiff had made a binding election at or before trial, precluding her from concurrently seeking relief under Count V, her alternate statutory claim against defendants. Oral argument was thereafter scheduled on the punitive damage claims that parallel those decided by the jury on Count I and on plaintiff's claim for an allowance of attorneys' fees, previously documented in post-verdict filings.

At the scheduled argument on June 2, 1995, plaintiff renewed, by a motion for sanctions, a claim that defendants' counsel had engaged in signalling answers to witnesses, by nodding during the course of examination by plaintiff's counsel. Subsequent filings have been made by

the parties on the question of sanctions, and plaintiff further requests an additional hearing on this subject.

After more than due deliberation, the court has concluded that relatively simple disposition may be made of the pending issues.

Post-trial material on punitive damages is, in my judgment, inappropriate. Given my previous view that an election has not been made, the briefing and materials contesting punitive damages are essentially efforts to obtain a different appraisal than was done by the jury, in resolving the punitive damage issues under Count I. This is neither the time nor the forum for such second-guessing and supplementation on the damage issue. This was not a matter severed for post-trial consideration. On the contrary, defendants should have presented their whole story to the jury.

On issues decided by the jury I cannot appropriately, on "equitable" consideration, reach different results. *Sorlucco v. New York City Police Dept.*, 971 F.2d 864, 873-4 (2d Cir. 1992) (Title VII rulings by a trial judge must be made in conformity with jury findings under 42 U.S.C. § 1983); *Kitchen v. Chippewa Valley Schools*, 825 F.2d 1004, 1014 (6th Cir. 1987) (issues under Michigan statute and Title VII are essentially the same; court bound by verdict); *Lee v. Consolidated School Dist.*, 534 F.Supp. 672 (W.D. Mo. 1982) (reinstatement issue should be ruled consistently with damage verdict in § 1983 case, even when the trial judge questions the verdict). To the extent the Missouri statute is permissive, assuming the jury verdict was sound, as I

must at this time, permissive action will be taken in conformity with the verdict.[1]

On the question of attorneys' fees, a pertinent case to be considered is *Carpenter v. Discount Motors, Inc.*, 652 S.W.2d 716 (Mo. App. 1983). The recovery in that case, involving fraudulent misrepresentation in the sale of a used automobile, was $400 in actual damages and $1,200 in punitive damages. Fees of $3,775.20 were claimed. Circuit Judge Moore ruled that $1,600 would be a reasonable fee, and denied a fee award because he considered the jury award to be " 'more than ample to compensate plaintiff under the circumstances.' " 652 S.W.2d at 717. The Missouri Court of Appeals affirmed the discretionary ruling. In a recent case, where $100 was awarded for punitive damages, the court allowed $2,356.50 for attorneys' fees. *Sunset Pools of St. Louis, Inc. v. Schaefer*, 869 S.W.2d 883 (Mo. App. 1994). While the approach of the Missouri courts may be somewhat more cautious than one typically finds in federal fee awards, this court, sitting as a Missouri court in a diversity case, should attempt to conform its rulings to those of the Missouri courts in applying the Missouri statute.[2]

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[1] The permissive nature of punitive damages under § 407.025 RSMo simply parallels the jury's discretionary control over such damages in a common law case. *See* MAI 10.01 ("you may award . . .). In my judgment, the factors to be resolved are the same.

[2] The ruling of the Missouri Supreme Court in *O'Brien v. B.L.C. Ins. Co.*, 768 S.W.2d 64 (Mo. Banc 1989), remanding a $1,000 award, relates to the calculation of a fee award and does not deal with the *Carpenter* issue, whether a punitive damage award should have some bearing in the discretionary award of fees.

Punitive damages are by definition a windfall to a plaintiff, not something compensatory in nature. Following the lead of Judge Moore, I conclude that the punitive damages in the total amount of $210,000 are so generous in this case that they subsume any need to compensate counsel further by a fee award. This case is to be contrasted with *Sunset Pools*, where absence of a fee award would have been an injustice to a successful plaintiff or the plaintiff's attorney. In this case, unless the fee award is used as additional means of punishing tortfeasors, it would clearly be less appropriate than in *Carpenter*.

I conclude that it would not be sound to "pad" the punitive damage award with a fee award in this case, unless I were seriously concerned with the inadequacy of the punitive damage award. I am not. If anything, I view the punitive damage awards as overly generous.

The request for attorneys' fees will therefore be denied, as a matter of discretion.

Turning to the question of sanctions against defendants' counsel for appearing to "signal" witnesses repeatedly during the course of examination by plaintiff's counsel, this is a matter which arose during trial and was renewed by motion at oral argument on the issues ruled above. Plaintiff makes a considerable showing, by affidavit, that Mr. Ensz has been challenged on this subject in several depositions in which Mr. Brown has been opposing counsel. The practice of nodding to witnesses occurred during this trial even after challenge was made and counsel was cautioned against such conduct. On the other hand, Mr. Ensz has shown that he sought warnings from co-counsel and from the parties. He attributes his

conduct to an unfortunate habit, barely controllable, at least in litigation against Mr. Brown.[3]

Although a request for hearing has been made, little purpose would be served by taking further evidence. The facts are essentially undisputed, except for some matters that can hardly be analyzed further. Some of the acknowledged nodding may have occurred in approval of testimony rather than in advance of answers. Mr. Ensz apparently became a silent cheerleader on occasion. The most significant issue, motivation, probably cannot be pursued much beyond the acknowledgement by plaintiff that the conduct likely was not premeditated (Doc. 128, p. 4), by the sworn denial by Mr. Ensz that he realized he was "coaching" a witness, and by the denials by two witnesses in this case that they were in fact coached or led by signals from counsel. The facts that are established, by defendants' candid affidavits, include acknowledgment that counsel nodded and shook his head "throughout the entire trial." Attachments to Doc. 127.

Counsel have not been very helpful in supplying pertinent cases. Disruptive conduct during depositions seems to have resulted in some sanctions litigation. E.g., *American Directory Service Agency v. Beam*, 131 F.R.D. 635, 644-5 (D. D.C. 1990); *Thomas v. Hoffmann-LaRoche, Inc.*, 126 F.R.D. 522, 525 (N.D. Miss. 1989); *Fleet Nat. Bank v. Export-*

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[3] The absence of any showing that Mr. Ensz gets "carried away" in litigation generally may simply signify that Mr. Brown stopped inquiry when ready sources were exhausted, or it may suggest that hostility between these particular attorneys has caused undue emotional involvement in this sort of litigation, with a breakdown in discipline.

Import Bank of the U.S., 612 F.Supp. 859, 870-1 (D. D.C. 1985).

Acceptance of a theory of willful coaching would justify significant sanctions. Bad faith has been repeatedly asserted to be the test for sanctions against counsel. For a comparatively modest imposition of sanctions, however, I accept plaintiff's view that conduct during trial that has a tendency to be disruptive or worse may deserve sanctions, even when occurring "without premeditation, and even in some senses unconsciously." As a deterrent to "attorneys who do not control their conduct" and fail to exercise an adequate degree of self-discipline, a reasonable monetary sanction seems useful and appropriate. It is therefore

ORDERED that defendants' counsel pay to the Clerk of the Court as sanctions the sum of $100. It is further

ORDERED that final judgment be entered on each of Counts I and V for actual damages against Blue Springs Ford Sales, Inc. for $2,535 and punitive damages for $50,000; against Blue Springs Ford Wholesale Outlet for actual damages $7,835, and punitive damages $100,000; against defendant Isom for actual damages, $7,835, and punitive damages, $30,000; against defendant Dudley for actual damages, $7,835, and punitive damages, $20,000; against defendant Graham for actual damages, $7,835,

and punitive damages, $10,000; and in favor of defendant Ridings.

/s/ Howard F. Sachs
HOWARD F. SACHS
UNITED STATES
DISTRICT JUDGE

Dated: March 26, 1996.

Supreme Court, U.S.
FILED
AUG 8 2000
CLERK

(2)

No. 99-2029

In The

Supreme Court of the United States

BLUE SPRINGS FORD SALES, INC.,
BLUE SPRINGS FORD WHOLESALE OUTLET,
ROBERT DUDLEY, FRED GRAHAM, DON ISOM,

Petitioners,

vs.

VICKI GRABINSKI,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF IN OPPOSITION

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REASONS FOR DENYING THE WRIT

The question presented by the Petition is not raised by the Eighth Circuit's ruling in that there certainly was not "uniform precedent" in the Missouri intermediate appellate courts on the issue of the scope of discretion in awarding attorney's fees. Under any circumstances, the Eighth Circuit's ruling was in strict compliance with even the most stringent standards for according deference to state intermediate appellate court decisions, so even if there were a conflict among the Circuits on such standards (which is quite doubtful) that issue is not presented by this case. The Petitioners also failed entirely to present to the Eighth Circuit their core argument here – that any ruling in favor of Ms. Grabinski would be both contrary to previous decisions of this Court and in conflict with decisions in other Circuit courts. Since the issue was not raised either by briefing or by the circumstances of the case, there was no discussion and no decision by the Eighth Circuit on the standard for weighing intermediate appellate court rulings in drawing conclusions about state law.

Petitioners refer to a total of three cases as establishing "uniform precedent" that a court has unlimited discretion in whether to award attorney's fees under R.S.Mo. § 407.025: *Kawin v. Chrysler*, 636 S.W.2d 40, 45 fn. 4 (Mo. banc 1982), *Carpenter v. Discount Motors, Inc.*, 652 S.W.2d 716 (Mo.App. 1983), and *Sunset Pools of St. Louis v. Schaefer*, 869 S.W.2d 883 (Mo.App. 1994). *Sunset* was never mentioned in Petitioner's brief in the Eighth Circuit, but in any event it involved a refusal to award attorney's fees to a party for work on appeal when that party suffered an

important reversal on the appeal – obviously not a precedent supporting unlimited discretion to refuse to award fees. *Kawin* expressly stated that it was not a case under Chapter 407, and mentioned only in an informational footnote that § 407.025 gives plaintiffs a discretionary right to attorney's fees; it did not provide any discussion at all on the standard for awarding such fees and is simply inapposite. *Carpenter*, as discussed at length by the Eighth Circuit, was actually decided – and the appeal dismissed – on the ground of a lack of subject matter jurisdiction; any comments in the very brief *Carpenter* decision regarding fees were dicta. In sum, there is no "precedent" at all in Missouri courts regarding the issue of the standard of discretion for § 407.025 fees.

On the other hand, as the Eighth Circuit discussed at length, the post-*Carpenter* Missouri Supreme Court case of *O'Brien v. B.L.C. Insurance Company*, 768 S.W.2d 64, 71 (Mo. 1989) is "apposite authority" on this issue, and strongly indicates that that Missouri Supreme Court would apply the fee award discretion standards found in federal cases under 42 U.S.C. § 1988(b). (App. A-6). Similarly, the Missouri appellate courts have subsequently relied on such federal standards in considering fee awards under other Missouri fee-shifting statutes (*see Melahn v. Otto*, 836 S.W.2d 525, 527-8 (Mo.App. 1992), and *Hernandez v. State Board of Registration For The Healing Arts*, 936 S.W.2d 894, 902 (Mo.App. 1997).

Thus, the Eighth Circuit's holding concerning the standards for awarding fees under Missouri's § 407.025 is in fact based on "convincing" and "persuasive" data, and is consistent with the most stringent standards of deference to intermediate appellate opinions that might be

gleaned from this Court's decisions or those of any other Circuit. Even if there were a split in the circuits (and the Respondent submits that there is no such split worthy of note) this case does not present an example of a ruling that would vary from circuit to circuit.

In addition, the Petitioners said nothing whatsoever regarding this question in their brief before the Eighth Circuit. In fact, they never mentioned, in their brief or their petition for rehearing, *any* of the cases cited in this Petition on the issue of the weight to be given to intermediate state appellate court decisions. In their petition for rehearing they argued only that this ruling was contrary to previous *Eighth Circuit* precedents – they never mentioned decisions of the Supreme Court or from other circuits.

The Respondent respectfully submits that for the reasons set forth above the Petition should be denied.

Respectfully submitted,

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Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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REPLY BRIEF FOR PETITIONERS

Respondent Grabinski's brief does not seriously challenge petitioners' arguments that the Court of Appeals below, like other Circuits, has misapplied the Court's teachings on the degree of deference federal courts predicting state law should give to intermediate state appellate court opinions. Respondent instead tries to create the impression that these arguments somehow have not been preserved, or that the decision below does not implicate them. Neither position has merit.

Petitioners have fully preserved their arguments. They supported the District Court's discretionary determination not to separately award attorney's fees to Ms. Grabinski, even as it was effectively awarding her fees by entering what the District Court itself termed "overly generous" punitive damages (with full knowledge of her attorney's 50 percent contingency contract). App. D-4; B-20. Petitioners pointed below to the discretionary language of the Missouri statute and to Missouri caselaw supporting the fact that Missouri trial courts had discretion to refuse to award *any* fees in Merchandising Practices Act cases. Petitioners explained at length that, given the current state of Missouri law, the District Court could not possibly have abused its discretion in refusing to award fees. Petitioners specifically discussed the Missouri Court of Appeals' decision in *Carpenter v. Discount Motors, Inc.*, 652 S.W.2d 716 (Mo. Ct. App. 1983), where the state court, like the District Court here, expressly held that a complete denial of fees was within the trial court's discretion under Missouri law, especially where a generous damages award was already in place. *Id.* at 718; *see* App. B-16, B-18-19.

Respondent's claim (Brief in Opp., p. 1) that petitioners' rehearing petition did not incorporate their so-

called "core" argument about the Eighth Circuit's errors also lacks merit. Filing a rehearing petition is not a prerequisite to filing a certiorari petition, so it is difficult to see how any argument could be waived. The two petitions, of course, also serve quite different ends. In any event, petitioners did present their "core" argument below. Their rehearing petition highlighted in detail all three Missouri decisions[1] indicating that Missouri gives its trial judges wide discretion to refuse to award fees under the very statute in question. Petitioners told the Court of Appeals that it had given insufficient weight to those decisions, and argued extensively that there was *no* reason, much less a convincing or persuasive one, to depart from them. Petitioners cited two Eighth Circuit opinions that followed this Court's 1940 teachings in *West* and *Stoner*[2] that considerable weight should be given to intermediate state appellate decisions. *See Baxter Int'l, Inc. v. Morris*, 976 F.2d 1189, 1196 (8th Cir. 1992) (stating that "state appellate court decisions are highly persuasive and should be followed when they are the best evidence of state law") (citing *Aetna Casualty & Sur. Co. v. General Dynamics Corp.*, 968 F.2d 707, 712-23 (8th Cir. 1992)). To imply that petitioners did not give the Court of Appeals an opportunity to correct its mistake is simply wrong.[3]

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[1] In addition to *Carpenter*, 652 S.W.2d at 717-18, petitioners cited *Sunset Pools of St. Louis v. Schaefer*, 869 S.W.2d 883 (Mo. Ct. App. 1994) as well as the Missouri Supreme Court's decision in *Kawin v. Chrysler Corp.*, 636 S.W.2d 40, 45 n.4 (Mo. banc 1982).

[2] *West v. AT&T*, 311 U.S. 223, 236-37 (1940); *Stoner v. New York Life Ins. Co.*, 311 U.S. 464, 467 (1940).

[3] Until the Court of Appeals' surprising decision to reject uniform Missouri authority, of course, there was no reason for petitioners to extensively brief the issue of the degree of deference to be afforded past Missouri decisions. Petitioners'

Nor are respondent's attempts to distinguish the clearly applicable Missouri decisions well-taken. Respondent suggests that because there are only three Missouri opinions addressing the exact question at issue – the award of attorney's fees under Mo. Rev. Stat. § 407.025.1 – this authority cannot be "uniform precedent." (Brief in Opp., p. 1). But there are *no* apposite cases supporting the Court of Appeals' "prediction." Although respondent suggests the Missouri Court of Appeals' critical holding in *Carpenter* is dictum (Brief in Opp., p. 2), even the Eighth Circuit did not go that far.[4] The fact remains that, dictum or not, *Carpenter's* discussion of the exact issue faced by the courts below is by far the best expression of Missouri law.

The two cases respondent cites[5] as supposed authority for Missouri courts' inclination to follow federal precedent are not persuasive. Both cases involved a different Missouri statute that, like the statute in *O'Brien*[6] relied on by the Court of Appeals, *requires* attorney's fees awards.[7]

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brief on the merits in the Court of Appeals nevertheless spent several pages discussing the *Erie* doctrine and principles of federalism, which petitioners correctly argued required the Court of Appeals in the circumstances of this diversity case to follow existing Missouri law.

[4] The Eighth Circuit instead suggested only that *Carpenter's* discussion of the Missouri statute was an "alternative holding" that "approached" dictum. App. A-6.

[5] *Melahn v. Otto*, 836 S.W.2d 525 (Mo. App. 1992) and *Hernandez v. State Bd. of Registration for the Healing Arts*, 936 S.W.2d 894 (Mo. App. 1997) (Brief in Opp., p. 2).

[6] *O'Brien v. B.L.C. Ins. Co.*, 768 S.W.2d 64 (Mo. 1989).

[7] The statute at issue in both *Melahn* and *Hernandez*, like the *O'Brien* statute, states that attorney's fees "shall" be awarded to the prevailing party. *See* Mo. Rev. Stat. 536.087; *compare* Mo. Rev.

One of respondent's cases concerned the definition of "prevailing party," and turned to federal law only after noting both that there was no Missouri authority and also that the Missouri statute in question was "patterned after" a federal law. *Melahn*, 836 S.W.2d at 527. The second case actually denied all fees in spite of the mandatory language of the statute! *Hernandez*, 936 S.W.2d at 905.

In short, no Missouri court has even hinted that attorney's fees under the Missouri Merchandising Practices Act should be anything other than "discretionary" as that term is commonly understood. *See* Debra E. Wax, Annotation, *Award of Attorneys' Fees in Actions Under State Deceptive Trade Practice and Consumer Protection Acts*, 35 A.L.R. 4th 12, 28-31 (1985 and Supp. 2000) (citing *Kawin* and *Carpenter*, and characterizing Missouri as one of the "discretionary" rather than "mandatory" states with respect to attorney's fees awards under its Merchandising Practices Act). Far from implying that such discretionary fee awards are effectively mandatory, two separate Missouri intermediate state appellate courts, the Western District Court of Appeals in *Carpenter* and the Eastern District in *Sunset Pools*, both refused to award *any* fees under that very statute. These holdings plainly show that the Eighth Circuit's "prediction" that Missouri would incorporate federal civil rights standards into its Merchandising Practices Act fee awards has no basis in fact. This fanciful "prediction" at a minimum lacks the "convincing evidence" and "persuasive data" this Court's decisions require to overcome existing Missouri law. *See*

Stat. § 407.546 (the *O'Brien* statute) (stating that an unsuccessful defendant "shall" be liable for attorney's fees) *with* Mo. Rev. Stat. § 407.025.1 (the statute at issue below) (stating merely that the Court "may, in its discretion" award fees).

Stoner, 311 U.S. at 467; *West*, 311 U.S. at 237. The Court of Appeals' decision below, and petitioners' examples of the widely varying standards used in other Circuits (Pet. at 8-9), thus directly raise the question presented by the petition.

This case presents an important issue of federalism. Despite existing Missouri caselaw, and the District Court's view that Missouri courts may be "somewhat more cautious than one finds in federal fee awards"(App. D-3), the Court of Appeals simply imported wholesale the liberal fee standards used in federal civil rights cases. And similar confusion in other Circuits appears widespread. The Court should grant certiorari to more fully explain the circumstances in which federal courts may ignore existing state intermediate appellate court opinions in predicting state law. In the alternative, if the Court does not consider this case appropriate for certiorari, it may still wish to consider granting the petition, vacating the Court of Appeals' opinion, and remanding with instructions to affirm the District Court's discretionary decision not to award attorney's fees.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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